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Supreme Court of the United States

October Term, 1979

NO. 79-1156

G. WILLIAM MILLER, SECRETARY OF THE TREASURY, ET AL.,

Petitioners

v.

CASTLEWOOD INTERNATIONAL CORP., a Florida Corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, CASTLEWOOD INTERNATIONAL CORPORATION, a Florida corporation, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's Opinion in this case. That opinion is reported at 596 F.2d 638 (5th Cir. 1979).

REASONS FOR DENYING THE WRIT

The alcoholic beverage industry is highly regulated by both the State of Florida and the federal government. The industry has been organized into three distinct mandated tiers; (1) the manufacturer or distiller; (2) the wholesaler or distributor; and (3) the retailer. Both the United States and the State of Florida have enacted legislation that prohibits manufacturers and wholesalers from giving assistance to retailers by any gifts, or loans of money or property, or by the giving of any rebates of any kind whatsoever.[1] The legislative intent supporting both laws is identical, that is, the eradication of the pre-Prohibition practice known as the "Tied House Evil" whereby manufacturers and wholesalers controlled the small retail outlets by giving them financial assistance.

Both laws, however, permit wholesalers to give "discounts in the usual course of business" to retailers.[2] Discounts "in the usual course of business" are a natural by-product of larger volume sales, and are commonplace in all industries including the alcoholic beverage industry. Discounts to a retailer can however be easily disguised and converted into unlawful gifts or rebates. The problem besetting both Florida and Federal governments is to permit business-related discounts on sales, while at the same time, to impose regulations that

[1]§561.42(1) F.S.; 27 USC §205(b).

[2]§561.42(6) F.S. (1977); Rul. 161, 1954-1C.B. 338, amplified by ATF Rul.74-6, ATF C.B. 1974, 50, amplified by ATF Rul. 75-12, ATF C.B. 1975, 38 superseded by ATF Rul. 76-16, ATF C.B. 1976, 78.

will prevent erosion of the Tied House Evil prohibitions. Each government has enacted laws which have the common design of restricting the authorized discount from being abused. Each law, however, employs a different method to achieve the same results.

The approach of the Federal Regulation requires that discounts for volume purchases bear a reasonable relationship to the cost-savings which accrue to the wholesaler, and any transaction in which the discount would result in a sales price below the wholesaler's "laid-in cost" is prohibited.[3]

Since 1963,[4] Florida has chosen to prevent the abuse of discounts by a different method. Florida has chosen to structure its alcoholic beverage regulatory scheme on the basis of discounts established by competitive market forces subject to the requirement of making the price available to all purchasers, rather than

[3]See, Bureau of Alcoholic, Tobacco and Firearms Rulings 74-6 and 76-16. The effect of the setting of this "floor" is to inhibit natural competition thus forcing consumer prices to remain high.

[4]Prior to 1963 the director of the Florida Department of Alcoholic Beverages was authorized to place a "floor" under inter-tier discounts. A "discount in the usual course of business" was defined by §561.01(13) F.S. (1961), to mean:

> A cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the director [of the Florida Dept. of Alcoholic Beverages]

The authority of the director was repealed in favor of a statutory provision providing for unlimited discounts subject to equality among purchasers in Ch. 63-32, §1 Laws of Fla, 1963; §561.01(10) F.S. (1977).

placing a "floor" under inter-tier discounts or requiring a cost-savings relationship to exist in the discount. Section 561.01(10), Fla. Stat. (1979), defines a "discount in the usual course of business" to mean:

> A cash discount given simultaneously at the time of sale. The same discounts shall be offered to all vendors buying similar quantities.

In response to a certified question from the United States Court of Appeals for the Fifth Circuit, requesting an interpretation of that language,[5] the Florida Supreme Court held:

> A wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in costs or the savings attributable to quantity sales.[6]

[5]*Castlewood International Corp. v. Simon*, 564 F.2d 695, 698 (5th Cir. 1977). Since Florida's statute encourages the exercise of free market forces to provide price equality among all purchasers, the discount ultimately inures to the consumer. The method employed by Florida is therefore a better suited vehicle to effectuate the free market, antitrust policies of both Florida, §561.42 F.S., and the United States, 27 U.S.C. §205(b).

[6]*Castlewood International Corp. v. Simon*, 367 So.2d 613 (Fla. 1979). The Florida Supreme Court accepted the construction of the statute earlier stated by the Attorney General, 1973 Op. Att'y Gen. 073-196, Fla. Admin. Code R. 7A-4.461. The court noted that the contrary dictum in *Musleh v. Fulton Distributing Co.*, 254 So.2d 815, 818-19 (Fla. 1st DCA 1971), was not controlling.

Although both the state and federal laws are trying to achieve the same end, there is a clear conflict between the methodology employed by each. The court below correctly observed the existence of this conflict:

> . . . [I]t is apparent that the two regulatory schemes are in conflict as the federal policy creates a floor on wholesale prices below which prices, acceptable under the Florida scheme, may not go. We must therefore address the issue of which scheme Florida wholesalers must follow. *Castlewood International Corp. v. Simon*, 596 F.2d 638, 641 (5th Cir. 1979).

It is well established that if this conflict concerned any commodity other than alcoholic beverages, the federal regulation would clearly prevail by reason of the Supremacy Clause, U.S. Const. Art. VI, §2, and the Commerce Clause, U.S. Const. Art. I, §8, cl. 3. In regard to the regulation of the alcoholic beverage industry, however, section two of the Twenty-first Amendment grants some quantum of additional power to the states.[7] While the precise parameters of that additional power conferred upon the states have not been made clear by case law, nevertheless the Fifth Circuit correctly found that the facts of this case are centered well within such boundaries.

[7]The Twenty-first Amendment was ratified in 1933 and, in addition to repealing the Eighteenth Amendment, provided in Section 2 that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

We do not claim that the Interstate Commerce Clause (U.S. Const. Art. I, §8, cl. 3) has been "stood on its head" by section two of the Twenty-first Amendment. The respondent acknowledges that the Twenty-first Amendment does not confer unlimited authority upon the states to regulate the liquor industry within its borders. The state's regulation even of its alcoholic beverage industry must yield where the state regulation is repugnant to overriding national concerns, to due process and equal protection, or where the state has sought to invade an area of exclusive federal interest, such as federally owned installations, regulation of commerce with foreign nations, or taxation of imports from foreign countries. *Castlewood International Corp. v. Simon,* 596 F.2d 638, 643 (5th Cir. 1979). None of those important federal interests exists here.

The Florida statute does not violate due process as in *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1970), or *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964). The Florida scheme of equality among purchasers certainly is the antithesis of any national concern for equal protection as in *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), or *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 178-179, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). The Florida statute does not purport to regulate in any area of exclusive federal concern as in *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938) (federally owned installations), *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d (1964)(regulation of commerce with foreign nations), or *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341, 84 S.Ct. 78,

11 L.Ed.2d 48 (1964) (taxation of imports from foreign countries in violation of the Export Import Clause). The Florida statute does not violate any federal laws, or offend strong national policy as in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 48 U.S.L.W. 4238 (No. 79-97), (Op. filed March 3, 1980), wherein this court held a California price maintenance law for alcoholic beverages to be in violation of the Sherman Act.[8] In that case, this court stated:

> . . . The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although states retain substantial discretion *to establish other liquor regulations, those controls may be subject to the Federal Commerce power in appropriate situations.* The competing state and federal interest can be reconciled only after careful scrutiny of those concerns in a "concrete case". (cite omitted) (Emphasis added.)

Id. at 4241.

Absent a conflict with strong federal interests, the state's regulatory scheme must prevail since section two of the Twenty-first Amendment provides that the states are entitled to exercise substantial discretion to regulate the liquor industry within their own borders. *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 46 L.Ed.2d 336 (1966).

[8]The Florida law, rather, promotes the national interest in free competition by allowing market forces to determine the negotiated price which is then made available to all purchasers.

Therefore, the Florida statute, which represents only a minimal exercise of that power, appropriately comes within the ambit of the Twenty-first Amendment. The most logically sound interpretation of the Twenty-first Amendment at least permits the states to exercise that discretion in order to regulate entirely intra-state sales of alcoholic beverages, to prohibit price fixing and to encourage free competition. The Florida statute accomplishes those goals, while at the same time effectuating the commonly shared federal policy of eliminating the "Tied House Evil," although using a slightly different mechanism. The Fifth Circuit correctly held:

> Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.
>
> . . .
>
> In the instant case, the Florida Statute concerns only liquor sold to Florida retailers. Florida retailers may not purchase directly from the manufacturer but rather, must purchase from a wholesaler located within the state. Fla. Stat. §561.14(3). In other words, the Florida provision touches and concerns only

> wholesalers and retailers within the state of Florida. There can be no doubt that this is a valid exercise of Florida's police power, as recognized by the Twenty-first Amendment. (cite omitted)
>
> . . .
>
> Thus absent a strong federal interest the state scheme must prevail. No interest of sufficient magnitude is advanced in support of ATF Ruling 74-6. Accordingly, we hold that insofar as ATF Ruling 74-6 and Florida Statute §561.42(6) conflict, the Florida Statute must prevail. Accordingly, we reverse the holding of the district court and remand this action so that the district court may enter its order in accordance with this opinion.

The court below correctly held that although the Twenty-first Amendment does not grant plenary power to the states, the Florida statute is well within the innermost dimensions of the grant of authority, thus presenting no challenge to the perimeters of the discretion conferred by the Amendment. The amount of power granted to the states by the Twenty-first Amendment has until now been defined in the negative by case law which has only determined when the power has been exceeded. The court below correctly found that the Florida statute which exercises only the minimal amount of that power which is necessary to accomplish legitimate state interests, without offending national concerns, "is a valid exercise of Florida's police power, as recognized by the Twenty-first Amendment."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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